IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Docket No. 857

SENECA NATION OF INDIANS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on October 29, 1964.

CITATION TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported at 338 F. 2d 55 (2d Cir. 1964). A copy of that opinion is annexed hereto as Appendix A, p. 1a, *infra.* The opinion of the United States District Court for

the Western District of New York, dated December 31, 1963, is unreported, and is annexed hereto as Appendix B, p. 8a, *infra*. The District Court's unreported order of summary judgment, dated January 17, 1964, is annexed hereto as Appendix C, p. 12a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1964 (Appendix A, *infra*, pp. 1a *et seq.*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Army, when condemning interests in Indian tribal lands for a Federal flood control project, also has authority to take a permanent easement across petitioner's reservation for a four-lane, limited-access highway, where (1) the United States by treaty has agreed never to disturb the Seneca Nation in the free use and enjoyment of its property, (2) the Secretary is required by law to build only a two-lane, unfenced replacement road, and (3) the proposed four-lane expressway will be constructed by the State of New York and is not part of any public work authorized by Congress.

STATUTES INVOLVED

Article III of the Treaty of November 11, 1794, 7 Stat. 44, between petitioner and the United States, after defining the country of the Seneca Nation, including the tracts involved in this case, recites in material part:

> . . . Now, the United States acknowledge all the land within the aforementioned boundaries, to be

> the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Section 207 of the Act of July 14, 1960, 74 Stat. 500, as amended by Section 208 of the Act of October 23, 1962, 76 Stat. 1196, 33 U.S.C. 701r-1(c), provides:

> For water resources projects to be constructed in the future, when the taking by the Federal Government of an existing public road necessitates replacement, the substitute provided will, as nearly as practicable, serve in the same manner and reasonably as well as the existing road. The head of the Agency concerned is authorized to construct such substitute roads to design standards comparable to those of the State, or, where applicable State standards do not exist, those of the owning political division in which the road is located, for roads of the same classification as the road being replaced. The traffic existing at the time of the taking shall be used in the determination of the classification. In any case where a State or political subdivision thereof requests that such a substitute road be constructed to a higher standard than that provided in the preceding provisions of this subsection, and pays, prior to commencement of such construction, the additional costs involved due to such higher standard, such Agency head is authorized to construct such road to such higher standard. Federal costs under the provisions of this subsection shall be part of the non-reimbursable project costs.

STATEMENT

Petitioner, the Seneca Nation of Indians, is and has been since time immemorial a recognized tribe of American Indians. A member of the famed Iroquois Confederacy, which for centuries dominated large portions of eastern Canada and the United States, the Seneca Nation today possesses only the Allegany, Cattaraugus and Oil Springs Reservations in Western New York.

Petitioner holds these three small reservations pursuant to Article III of the Treaty of November 11, 1794, 7 Stat. 44, under which the United States, for a valuable consideration, acknowledged Seneca title to the land and pledged never to disturb the Seneca Nation in the free use and enjoyment of its property. As Timothy Pickering, the personal envoy of President Washington, stated in a speech before the Seneca Council on October 5, 1794:

> . . . this [treaty] is a new and important security against your being cheated; and shows the faithful care which the United States now means to take for the protection of your lands.
>
> The Great Council of all the United States have declared that your lands shall not be taken from you, unless by a treaty of which the President and his wise men shall approve. . . The land is yours. *Pickering Papers,* Mass. Hist. Soc. 60: 224-229.

The continuing treaty obligation of the Federal Government to protect the lands of the Seneca Nation from invasion is not questioned. See, e.g., *The New York Indians,* 5 Wall. (U.S.) 761 (1867); *United States* v. *Forness,* 125 F. 2d 928 (2d Cir. 1942), *Cert. den. sub nom., City of Salamanca* v. *United States.*

Under the Flood Control Act of June 28, 1938, 52 Stat. 1215, as amended by the Acts of August 18, 1941,

55 Stat. 638, and December 22, 1944, 58 Stat. 889, however, Congress authorized a comprehensive plan for the construction, operation and maintenance of flood control works within the Ohio River basin, including the Allegheny River (Kinzua Dam) project in northwest Pennsylvania. As designed by the Corps of Engineers, the Kinzua project requires that the United States obtain a flowage easement and other rights-of-way over approximately 10,200 acres inside the Allegany Indian Reservation in New York. Although the Seneca Nation did not consent to the taking of its property, the right of the Federal Government to condemn interests in petitioner's lands for flood control purposes has been sustained. *Seneca Nation of Indians* v. *Brucker*, 262 F. 2d 27 (D.C. Cir. 1958), *cert. den.* 360 U.S. 909 (1959); *United States* v. *21,250 Acres of Land etc.*, 161 F. Supp. 376 (W.D.N.Y. 1957).

In connection with the Allegheny River project, the United States must relocate State Route No. 17, an existing two-lane road which runs through the Allegany Indian Reservation. Record on Appeal, hereinafter cited as "R", pp. 90-91.* Respondent admits that reconstruction of Route 17 as a two-lane highway "will, as nearly as practicable, serve in the same manner and reasonably as well as the existing road", and that the "traffic existing at the time of the taking" does not justify construction of a four-lane highway. R. 94, 137, 191; Act of July 14, 1960, as amended, *supra*, 33 U.S.C. 701r-1(c). Notwithstanding these facts, the Corps of Engineers and the State of New York entered into a contract in August of 1961 under which the Federal Government agreed to acquire on Seneca

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* Unless otherwise indicated, record references are to the original record before the Court of Appeals. The certified record from the court below is cited as "CR."

lands, and turn over to the State, a four-lane, limited-access highway easement to facilitate the future conversion of Route 17 from a two-lane road into the so-called Southern Tier Expressway.[1] R. 85, 90-91, 104-105.

Respondent commenced this action on October 11, 1963, in the United States District Court for the Western District of New York, by the filing of a complaint (R. 1-24), notice (R. 25-48) and declaration of taking (R. 49-69), seeking to acquire easements and rights-of-way for the Kinzua project within the Allegany Indian Reservation under authority of the various Federal Flood Control Acts, but also including among the estates taken:[2]

> The permanent and assignable easement on Tracts Nos. 3016-E-4 and 3060-E-3 for the purpose of constructing, reconstructing and maintaining thereon a highway and appurtenances, *together with the right to control access on such highway to and from which the owner or occupants of abutting property or any other persons shall have no right of access either as pedestrains, or operators of vehicles or in any other capacity, excepi at junctions of such highway with other public highways.* . . . (Emphasis supplied. CR. 7.)

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[1] The facts are undisputed that, in condemning the additional right-of-way through the Allegany Reservation, the Secretary of the Army merely is accommodating the State of New York (R. 95), that New York and not the United States will pay for the extra land taken (R. 85-86, 105), and that the State plans to build only a two-lane road now, with the full Southern Tier Expressway scheduled for completion at some indeterminate future date. R. 137, 191.

[2] The United States has instituted a total of 29 cases to condemn interests in Seneca lands for the Allegheny River project, 8 of which involve a taking for the Southern Tier Expressway.

In its answer, filed October 25, 1963, the Seneca Nation specifically denied "that the easement for a limited access highway, which plaintiff seeks to condemn. . . , is necessary to provide adequately for a flood control project or other uses incident thereto in connection with the Allegheny River Reservoir Project" (CR. 9), and further denied that Congress has "authorized the taking of defendant's lands." CR. 10.

The interests in Indian land which the United States wishes to acquire over and above the easement necessary to rebuild Route 17 as a two-lane road concededly constitute a "betterment" for the benefit of New York State (R. 86, 91-2, 105), and are not an integral part of the Allegheny River project. Insofar as petitioner is concerned, a four-lane, limited-access highway easement will necessitate the taking of 81 more acres of reservation land than a two-lane replacement road would require. R. 98, 109. Far worse, a fenced expressway (R. 163) will even further restrict the few remaining areas where Senecas forced to relocate by the Kinzua Dam may live and will seriously disrupt intra-reservation traffic, particularly by pedestrians.

In view of petitioner's opposition to the condemnation of its treaty-protected property, the District Court on October 18, 1963, entered an order (R. 70-74) directing the Seneca Nation to show cause why the Federal Government should not be granted possession of all lands involved in the case, including the two tracts desired for an expressway, and shortly thereafter the United States also filed a motion asking in the alternative for judgment on the pleadings or to strike petitioner's answer. R. 80-81. In response the Seneca Nation acknowledged "that the plaintiff has a right

to obtain possession of all lands involved in this action which are necessary for the Allegheny River Reservoir Project," including tracts "which are required to replace and relocate existing State Route 17", but again contended that respondent has no right to possession of any lands which merely are desired by the State of New York for the future expansion of Route 17 from a two-lane road to a four-lane limited-access highway. R. 185 *et seq.*

Following oral argument on November 4, 1963, the Government submitted four supplemental affidavits (R. 82-177), and requested that its motion for judgment on the pleadings be treated as a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure. On December 31, 1963, the District Court issued a decision granting respondent's motions for delivery of possession and summary judgment. Appendix B, p. 8a, *infra*; CR. 11-13. The District Court entered an order of summary judgment with respect to Tracts 3016-E-4 and 3060-E-3 on January 17, 1964 (R. 195-96), which order recited, *inter alia,* that the decision "holding that the United States of America is authorized to condemn an easement for a limited-access highway over lands claimed by defendant, the Seneca Nation of Indians, under the Treaty of November 11, 1794, 7 Stat. 44, involves a controlling question of law as to which there is substantial ground for differences of opinion. . . ." Appendix C, p. 13a, *infra*; CR. 15.

On January 27, 1964, the Seneca Nation petitioned the United States Court of Appeals for the Second Circuit for leave to appeal under 28 U.S.C. 1292(b), and the Circuit Court granted such permission in an order issued February 12, 1964. The notice of appeal

was filed on February 17, 1964 (R. 197), the Court of Appeals heard oral argument on June 1, 1964, and the court below issued an opinion affirming the District Court by a vote of 2-1 on October 29, 1964. Appendix A, p. 1a, *infra*. This petition for a writ of certiorari is directed to that decision.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES AN IMPORTANT AND NOVEL QUESTION CONCERNING EXERCISE OF THE FEDERAL POWER OF EMINENT DOMAIN OVER A TREATY-PROTECTED INDIAN RESERVATION.

The power of Congress to take or to sanction the taking of Indian land for public purposes without regard to any prior treaty, executive agreement or legislation is now well recognized. *United States* v. *Klamath and Moadoc Tribes*, 304 U.S. 119, 124 (1938); *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641 (1890). The more recent court decisions involving this issue thus have turned upon the manner in which Congressional approval for the condemnation of tribal lands must be expressed. See, *e.g.*, *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (2d Cir. 1958), *cert. den.* 358 U.S. 841 (1958), *appeal dismissed as moot*, 362 U.S. 608 (1960); *United States* v. *2005.32 Acres of Land, etc.*, 160 F. Supp. 193 (D. S. Dak. 1958), *dismissed as moot sub nom., United States* v. *Sioux Indians of Standing Rock Reservation*, 259 F. 2d 271 (8th Cir. 1958). In other words, while the authority of Congress to infringe a treaty apparently is no longer open to question, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Pigeon River Improvement, Slide & Boom Co.* v. *Cox*, 291 U.S. 138, 160 (1934).

The Court of Appeals in this case has declared that Congress need not specifically and expressly authorize

each particular taking of Indian land, but can (and did) choose to delegate some of its power under general statutes to administrative offices and agencies. Appendix A, pp. 2a-3a, *infra*. In holding that interests in petitioner's treaty-protected reservation may be condemned by Government officials without a clearcut showing of legislative approval, the court below in effect repudiated, *sub silentio*, the opposite rule adopted by the Court of Appeals for the District of Columbia Circuit under like circumstances in *Seneca Nation of Indians* v. *Brucker*, 262 F. 2d 27 (1958), *cert. den.*, 360 U.S. 909 (1959).[3] Moreover, in allowing Seneca tribal lands to be appropriated for a project never considered or sanctioned by Congress, the court below wholly ignored the many opinions of this Court giving substantive meaning and effect to Indian treaties. See, e.g., *Tulee* v. *Washington*, 315 U.S. 681, 684-85 (1942); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Winters* v. *United States*, 207 U.S. 564, 576-77 (1908). Because the decision below so deviates from hitherto accepted principles of law and so gravely imperils our national commitment to a dependent people, this Court is here asked to grant certiorari.

A. The Court Below Erred in Holding That Treaty-Protected Indian Lands May Be Condemned in the Absence of a Clear Congressional Intent to Authorize Such Action.

In Article III of the Treaty of November 11, 1794, 7 Stat. 44, the United States acknowledged the Allegany Reservation to be the property of the Seneca Nation and promised never to "claim the same, nor disturb the Seneka nation . . . in the free use and

[3] In view of the history of the lands involved, this Court did not reach the treaty issue in *Federal Power Comm.* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1959).

enjoyment thereof; but it shall remain theirs, until they choose to sell the same. . . ." As this Court has observed, "These are the guaranties given by the United States, and which her faith is pledged to uphold." *The New York Indians,* 5 Wall. (U.S.) 761, 768 (1867). Absent consent by the Senecas, or a unilateral violation of the treaty, the Federal Government has a continuing legal duty to keep petitioner's lands intact and inviolate.

In litigation which preceded this law suit, a Congressional intent to authorize the taking of land within the Allegany Reservation in connection with the Allegheny River project, notwithstanding the 1794 Treaty, was found in the legislative history of the appropriations acts providing funds for the planning and construction of the Kinzua Dam. *Seneca Nation of Indians* v. *Brucker,* 262 F. 2d 27 (D.C. Cir. 1958), *cert. den.,* 360 U.S. 909 (1959); *United States* v. *21,250 Acres of Land, etc.,* 161 F. Supp. 376 (W.D.N.Y. 1957). In the instant proceeding, though, the Secretary of the Army is seeking to acquire not merely interests in land necessary for the Kinzua Dam, but also an easement through petitioner's reservation adequate for the future conversion of New York Route No. 17, an existing two-lane road, into the Southern Tier Expressway, a proposed four-lane, limited-access highway. Statement, pp. 5-6, *supra.* This extra taking, as Judge Moore observed, would divide the Senecas "as effectively as if a Chinese Wall separated one part of the reservation from the other." Appendix A, p. 4a, *infra.*

The replacement or relocation of existing State highways is a proper project purpose (Act of June 28, 1938, 52 Stat. 1215, as amended, 33 U.S.C. 701c-1), and, in view of the *Brucker* decision, the Seneca Nation

does not challenge the Government's right to take its lands for a two-lane road easement to replace or relocate existing State Route No. 17. Under the flood control laws, however, this substitute road need serve only "as nearly as practicable . . . in the same manner and reasonably as well as the existing road," and need be sufficient only to accommodate "traffic existing at the time of the taking" (Act of July 14, 1960, 74 Stat. 500, 33 U.S.C. 701r-1(c)), and respondent admits that a two-lane highway will take care of the current volume of traffic across the Allegany Reservation.

The right-of-way condemned by the United States beyond the easement necessary to re-establish Route 17 as an unfenced two-lane road, therefore, concededly will be used for a "betterment"—a substitute road designed to a far higher standard than the Federal Government is obligated to provide. The proposed four-lane, limited-access highway which New York desires to build in fact is not part of the Allegheny River project or in any way required for its construction, operation and maintenance, but rather is an independent State public work. Accordingly, whatever authority Congress has vested in the Secretary to take Seneca lands for the Kinzua Dam may not be invoked to justify the taking of tribal property for the Southern Tier Expressway.[4]

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[4] The State of New York did not authorize the Southern Tier Expressway until April 29, 1962. McKinney's Consolidated Laws of New York, Book 24, Part 2, Highway Law, Section 340-c, L. 1962, c. 878, eff. April 29, 1962. All the Federal statutes relied upon by the Court of Appeals for the District of Columbia Circuit and the District Court for the Western District of New York in finding a legislative intent to permit the taking of Seneca lands in connection with the Allegheny River project were enacted long before that date. *Seneca Nation of Indians* v. *Brucker, supra; United States* v. *21,250 Acres of Land, etc., supra.*

The basic test established in *Seneca Nation* v. *Brucker, supra,* for giving or withholding effect to an express treaty protection against the invasion of Indian lands "is whether Congress has, in a sufficiently clear and specific way, shown an intention" to sanction exercise of the power of eminent domain within the reservation.[5] 262 F. 2d at 27. The record in this case shows that Congress actually has not approved or even considered the Southern Tier Expressway, either separately or as part of the overall Allegheny River project.[6] By permitting the condemnation of an easement through the Allegany Reservation for a State superhighway, therefore, the court below upheld the taking of treaty-protected Indian lands in the absence of any legislative intent, explicit or implicit, to authorize that action. Such a decision, which, in contrast to the *Brucker* rule, would leave the question of honoring our nation's most solemn pledges to the discretion of subordinate Government officials cannot be allowed to stand.

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[5] This test, of course, is no more than a logical application of the "cardinal principle of construction that repeals by implication are not favored." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *Federal Trade Comm.* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946); *United States* v. *Forty-Three Gallons of Whisky, etc.*, 108 U.S. 491 (1883).

[6] Since payment for the additional land is a State responsibility (33 U.S.C. 701r-1(c)), Congress has not been asked to appropriate Federal funds for the acquisition of a four-lane, limited-access road easement. Moreover, Congress may not be charged with knowledge that New York might seek a "betterment," because the statute allowing the Secretary of the Army, if so requested, to build a substitute road to a higher standard than required was not passed until long after construction of the Allegheny River project had commenced. Act of October 23, 1962, 76 Stat. 1196, 33 U.S.C. 701r-1(c).

B. The Court Below Erred in Holding That Treaty-Protected Indian Lands Enjoy No Greater Immunity from Condemnation Than Other Private Property.

The key question here presented is whether Congress has sanctioned the taking of lands within the Allegany Reservation for the Southern Tier Expressway. On this crucial issue, the court below simply asserted that Congress has delegated to the Secretary of the Army administrative discretion as to the amount of land required for the relocation of roads in the Allegheny River project, and that the Secretary acted reasonably and within his authority in extending Route 17 from a two-lane to a four-lane, limited-access highway. Appendix A, pp. 2a-3a, *infra.* Basic to this decision is the unstated premise that treaty-protected Indian lands enjoy no different legal status than any other lands the Federal Government may wish to appropriate. In other words, a majority of the Court of Appeals concluded that legislative authorization for the Kinzua Dam gave the Secretary of the Army unfettered discretion to take interests in petitioner's reservation for *any* public purpose, whether or not the public work so aided is part of the authorized project.

The fact remains that under the Treaty of November 11, 1794, *supra,* the United States, for a valuable consideration, recognized the Seneca Nation's title to land and vested in the Nation a right to be free from disturbance thereon. *The New York Indians,* 5 Wall. (U.S.) 761, 768 (1867). This Court repeatedly has declared that treaties with Indian tribes and laws affecting Indians must be liberally construed for their benefit and protection. *Tulee* v. *Washington,* 315 U.S. 681, 684-85 (1942); *United States* v. *Shoshone Tribe,* 304 U.S. 111, 116 (1938); *Jones* v. *Mechan,* 175 U.S. 1,

10-11 (1899). Indeed, a holding that a treaty with an Indian tribe has no force or effect is plainly erroneous. *Federal Power Comm.* v. *Tuscarora Indian Nation,* 362 U.S. 99, 124, 136-42 (1960); *Squire* v. *Capoeman,* 351 U.S. 1, 6-7 (1956); *Tulee* v. *Washington, supra,* at 684-85 (1942); *Carpenter* v. *Shaw,* 280 U.S. 363, 367 (1930); *Winters* v. *United States,* 207 U.S. 564, 576-77 (1908).

For Indians, land is their most precious possession.[7] Within the context of this case, what force can our nation's word have if a pledge that lands will remain inviolate does not mean at the very least that the Federal power of eminent domain cannot validly be exercised within a treaty-protected Indian reservation in the absence of a clear and specific Congressional intent to authorize such action? The decision below, allowing an administrative officer to condemn interests in petitioner's reservation for a State project of which Congress never heard, makes a mockery of the 1794 Treaty and all similar agreements to which the United States is a party.

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[7] "It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise." *Federal Power Comm.* v. *Tuscarora Indian Nation, supra,* at 142 (dissent; footnote omitted).

II. THE DECISION BELOW CONFLICTS WITH NATIONAL POLICY TO PROTECT INDIAN TRIBAL LANDS FROM INDISCRIMINATE CONDEMNATION FOR STATE HIGHWAYS.

Tribal lands within an Indian reservation are not subject to the State power of eminent domain except where Congress specifically has so provided. *United States* v. *Minnesota,* 95 F. 2d 468 (8th Cir. 1938), *aff'd. sub nom., Minnesota* v. *United States,* 305 U.S. 382 (1939); *Tuscarora Nation of Indians* v. *Power Authority,* 257 F. 2d 885 (2d Cir. 1958), *cert. den.* 358 U.S. 841 (1958), *appeal dismissed as moot,* 362 U.S. 608 (1960); Cohen, *Federal Indian Law* (Interior Dept. Ed. 1958) 642. Congress has permitted the taking of allotted lands (Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. 357), but a State may obtain a road right-of-way across tribal lands only with the consent of the Secretary of the Interior (Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. 311), and, in many cases, also the consent of the Indians. Act of February 5, 1948, 62 Stat. 18, 25 U.S.C. 324. With specific reference to the condemnation of petitioner's property for highway purposes, Congress provided in Section 8 of the Act of February 19, 1875, 18 Stat. 330:

> That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing [of] highways and bridges shall be in force within said villages . . . [Salamanca, Vandalia, etc.], and *may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations* [Allegany and Cattaraugus], or in either of them. . . . (Emphasis supplied.)

In this case, the Secretary of the Army has volunteered to condemn for the State of New York a four-lane, limited-access highway easement which the State

could not acquire under New York law. In upholding that administrative action, the court below sanctioned the violation of a long-standing national policy prohibiting the taking of tribal lands within an Indian reservation for a State road except in the manner and under the circumstances prescribed by Congress.

CONCLUSION

This Court recently acknowledged that "All members of this Court—no one more than any other—adhere to the concept that agreements are made to be performed—no less by the Government than by others." *Federal Power Comm.* v. *Tuscarora Indian Nation, supra,* at 124. Keeping faith with that principle plainly requires that certiorari be granted to review the decision of the Court of Appeals in the instant case.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 468—September Term, 1963.

(Argued June 1, 1964 Decided October 29, 1964.)

Docket No. 28817

SENECA NATION OF INDIANS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Before: MOORE, KAUFMAN and MARSHALL, *Circuit Judges*.

Appeal from summary judgment for the Government in an action to condemn land on Indian reservation, brought in the United States District Court for the Western District of New York, John W. Henderson, *Judge*. *Affirmed*.

ARTHUR LAZARUS, JR., Washington, D. C. (David E. Birenbaum and Strasser, Spiegelberg, Fried, Frank & Kampelman, of counsel), *for Appellant*.

EDMUND B. CLARK, Attorney, Dept. of Justice, Washington, D. C. (Ramsey Clark, Asst. Attorney General, John T. Curtin, U. S. Attorney, Buffalo, New York and Roger P. Marquis, Attorney, Dept. of Justice, Washington, D. C., on the brief), *for Appellee*.

MARSHALL, *Circuit Judge:*

The Seneca Nation of Indians appeals from an order of the United States District Court for the Western District of New York granting summary judgment to the United States in a condemnation suit. On October 11, 1963 the United States began condemnation proceedings to acquire certain land in Cattaraugus County, New York in connection with the Allegheny Reservoir Project. The Seneca Nation filed an answer specifically denying that the portion of its land was necessary for the dam and further denied

that Congress had authorized the taking of the land in question. The United States moved for judgment on the pleadings. Both sides filed affidavits and after oral argument the summary judgment and order of possession were granted in favor of the United States. We affirm the judgment.

This appeal presents an exceedingly narrow issue. While asserting rights under the Treaty of November 11, 1794 (7 Stat. 44) between the United States and the Seneca Nation to keep its lands inviolate, the Seneca Nation also recognizes the power of Congress to take or to sanction the taking of its land for public purposes without regard to the treaty. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641 (1890); *United States* v. *Klamath & Moadoc Tribes*, 304 U.S. 119 (1938). See *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (2 Cir.), *cert. denied* 358 U.S. 841 (1958). Indeed, there is no question of the right of the United States to condemn the land here in question for the public purpose of constructing the reservoir project. *Seneca Nation of Indians* v. *Brucker*, 262 F. 2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959).

The replacement or relocation of existing highways unquestionably is a part of the reservoir project authorized by Congress. Act of June 28, 1938, 52 Stat. 1214, as amended, 33 U.S.C.A. § 701 o-1. The land involved in this action is land necessary to extend the re-routed Route 17 from a two-lane to a four-lane limited access highway. The decision to make this extension was made by the Secretary of the Army and Congress delegated this authority to the Secretary. See 33 U.S.C.A. § 701 c-1; 33 U.S.C.A. § 701 r-1(c). As my Brother Moore once recognized, *Tuscarora Nations of Indians* v. *Power Authority*, 257 F. 2d 885, 893 (2 Cir.), *cert. denied*, 358 U.S. 841 (1958), Congress need not itself specifically and expressly authorize by "special enactment" each particular taking of Indian land, but can choose to delegate some of its authority to administrative

offices and agencies. We see no reason to interfere with this reasonable exercise of delegated administrative discretion as to the amount of land required for the relocation of the road. *Shoemaker* v. *United States*, 147 U.S. 282 (1893); *Berman* v. *Parker*, 348 U.S. 26 (1954). It is hard to see how a four-lane road will interfere with communication among the Senecas so much more than a two-lane road and, as the District Court found, the increased highway requirements result in part from the Allegheny Reservoir Project itself. Because the Secretary of the Army acted within his authority and reasonably, we affirm the judgment.

MOORE, *Circuit Judge* (dissenting):

I must dissent.

"Great nations, like great men, should keep their word." (Mr. Justice Black, dissenting, The Chief Justice and Mr. Justice Douglas, joining, in *F. P. C.* v. *Tuscarora Indian Nation*, 329 U.S. 99, 142.) Now, by curious anomaly, it is the Government which is the Indian giver and the Government which breaks its word. The majority justify their affirmance by premising it upon "an exceedingly narrow issue." In syllogistic form, the argument is that Congress has the power to take Indian lands for public purposes without regard to treaties; that the construction of a reservoir project is a public purpose; that relocation of existing highways is part of the reservoir project; that Congress delegated to the Secretary of the Army the power to use "administrative discretion as to the amount of land required for the relocation of the road; and that [the illogical *non sequitur*] the land condemned (not by Congress but by "administrative discretion") is "necessary to extend the re-routed Route 17 from a two-lane to a four-lane limited access highway." At a time when so much attention is being paid to so-called "civil rights" which are statutorily created because of certain racial problems, some consideration might well be given to the Indian race and to those

"just rights" which President Washington assured the Senecas this Government would protect.[1] And if the "King" (of England) "never coerced a surrender of them [their lands]" so much the more should "the Great Council of the United States" show the faithful care which the United States [now] means to take for the protection of [your] lands."[2]

Despite these high-sounding protestations of enduring good faith, against what factual background does the Secretary of the Army decide that the State of New York should have a four-lane, fenced-in, limited-access highway, dividing the Senecas as effectively as if a Chinese Wall separated one part of the reservation from the other?

Pursuant to the Treaty of November 11, 1794 (7 Stat. 44), the Seneca Nation has held the reservation now invaded. Notwithstanding the promise of the United States to "never claim the same, nor disturb the Seneca nation" and to protect the Seneca's right of perpetual occupancy, this commitment has been modified from time to time by projects which the Congress has believed to be in the national interest such as the type of flood control[3] here involved. The Kinzua Dam Project required the taking of some 10,000 acres of land inside the Allegheny Reservation. This land was condemned with court approval. See *United States* v. *21,250 Acres of Land, etc.*, 161 F. Supp. 376 (W.D. N.Y. 1957); *Seneca Nation* v. *Brucker*, 262 F. 2d 27 (D.C. Cir., 1958), *cert. den.*, 360 U.S. 909 (1959).

The flooding of these lands necessitates the relocation of New York State Route 17, an existing two-lane highway which runs through the Reservation. Mindful that its "water resources projects" might require relocation of roads, Congress specifically provided that "when the taking by the Federal Government of an existing public road

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[1] 4 American State Papers (Indian Affairs, Vol. I, 1832) 142.

[2] Pickering Papers, Mass. Hist. Soc. 60:224-229.

[3] Flood Control Act of June 28, 1938, 52 Stat. 1215, as amended.

necessitates replacement, the substitute provided, will, as nearly as practicable, serve in the same manner and reasonably as well as the existing road" and that "The traffic existing at the time of the taking shall be used in the determination of the classification." However, a Congressional Act, Section 207, Act of July 14, 1960, 74 Stat. 500, as amended, 76 Stat. 1196, 33 U.S.C.A. § 701 r-1(c), provides that "In any case where a State or political subdivision thereof requests that such a substitute road be constructed to a higher standard than that provided in the preceding provisions of this subsection, and pays, prior to commencement of such construction, the additional costs involved due to such higher standard, such Agency head is authorized to construct such road to such higher standard." But this statute was enacted for "water resources" projects generally and was not directed towards the taking of property on an Indian Reservation.

The power of Congress to take Indian Reservation lands for public purposes without regard to prior treaty promises is established. *United States* v. *Klamath and Moadoc Tribes,* 304 U.S. 119 124 (1938); *Cherokee Nation* v. *Southern Kansas Ry. Co.,* 135 U.S. 641 (1890). But the real "narrow issue" posed by the very decision authorizing the taking of the Seneca's lands for the Allegheny Reservoir Project is "whether Congress has, in a sufficiently clear and specific way, shown an 'intention to abrogate or modify a treaty.'" Such an intention "is not to be lightly imputed to Congress." *Pigeon River Improvement, Slide and Boom Co.* v. *Cox,* 291 U.S. 138, 160 (1924).

There are cities in New York State which could well be connected by four- or six-lane, limited-access highways where the most direct route might well be through an Indian Reservation. If New York State applied to Congress for the right to take Indian lands for such a superhighway, then Congress would have to make a decision whether to respect the Treaty or yield to so-called "progress." However, Congress has not been faced with,

or passed upon, this question. The proposed for the future, four-lane, limited-access "Southern Tier Expressway" which New York State envisions for itself in the future was not part of the Allegheny Reservoir Project and could not have even impliedly been embraced within Congressional approval.[4] *A fortiori,* if Congress itself did not approve such a highway, it could not have intended to invest an administrative officer with the power to condemn property for a purpose which Congress had not authorized.

No argument should be required for the proposition that the Secretary of the Army is not authorized at the behest of the State of New York to condemn private property—much less Indian treaty-protected property. Yet for all practical purposes, this taking is tantamount to such a condemnation. Under the guise of a road of "a higher standard" New York State is, in effect, promoting a public highway project quite independent of the water resources projects authorized by Congress.

The Supreme Court has said that "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Tulee* v. *Washington,* 315 U.S. 681, 684-685 (1942). As early as 1866 the Supreme Court said as to the Seneca nation that "The United States have acknowledged the reservations to be the property of the Seneca nation—that they will never claim them nor disturb this nation in their free use and enjoyment, and that they shall remain theirs until they choose to sell them. These are the guarantees given by the United States, and which her faith is pledged to uphold." *The New York Indians,* 5 Wall. (72 U.S.) 761, 768. For the national welfare, Congress has had to encroach upon these guarantees. This encroachment has been recognized and well expressed in *F. P. C.* v. *Tus-*

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[4] McKinney's Consolidated Laws of New York, Book 24, Part 2. Highway Law, Section 340-c, L. 1962, c878, eff. April 29, 1962.

carora Indian Nation, supra, p. 141 (dissenting opinion, Mr. Justice Black):

> Of course, Congress has power to change this traditional policy when it sees fit. But when such changes have been made Congress has ordinarily been scrupulously careful to see that new conditions leave the Indians satisfied. Until Congress has a chance to express itself far more clearly than it has here the Tuscaroras are entitled to keep their reservation. It would be far better to let the Power Authority present the matter to Congress and request its consent to take these lands. It is not too late for it to do so now. If, as has been argued here, Congress has already impliedly authorized the taking, there can be no reason why it would not pass a measure at once confirming its authorization.

Would it not be far more consistent with the Indian policy so frequently expressed by Congress and the Supreme Court to let Congress decide whether it wishes to give to the State of New York the power to condemn Indian land for a superhighway rather than to impute to Congress an intent to vest the Secretary of the Army with such powers.

Finally, it is not amiss to note the willing cooperation of the Senecas with the wishes of the "Great Council" which has authorized the taking of their lands for flood control. They have even acquiesced gracefully in the necessitous relocation of Route 17. Their only objection is to the construction of a superhighway which will bar access from one part of their reservation to the other, will separate neighbor from neighbor and which, as they represent, "will restrict the areas where Senecas forced to relocate by the Kinzua Dam may live and will significantly disrupt intrareservation traffic." Their petition (as expressed in this litigation) to the "Great Council" (judicial) to have that other "Great Council" (legislative) determine whether this situation shall come to pass is not unreasonable.

APPENDIX "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil 10,434

UNITED STATES OF AMERICA
v.
188.99 ACRES OF LAND, et al.

Civil 10,435

UNITED STATES OF AMERICA
v.
225.62 ACRES OF LAND, et al.

Civil 10,496

UNITED STATES OF AMERICA
v.
251.23 ACRES OF LAND, et al.

Civil 10,508

UNITED STATES OF AMERICA
v.
278.32 ACRES OF LAND, et al.

Civil 10,532

UNITED STATES OF AMERICA
v.
150.83 ACRES OF LAND, et al.

JOHN T. CURTIN,
United States Attorney,
for the Government.

ARTHUR LAZARUS, JR.,
Salamanca, New York,
Attorney for Defendant,
Seneca Nation of Indians.

The declaration of taking, complaint, lies pendens, and notice of taking in Civil 10,532 were filed on October 11, 1963. Thereafter the defendant, Seneca Nation of Indians, responded to an order directing it to show cause why an order of possession should not be granted the Government. Also returnable and argued at that time were motions by the Government for judgment on the pleadings or, in the alternative, for an order striking the defendant's affirmative defenses in Civil 10,434, 10,435, 10,496, 10,508, as well as Civil 10,532. Except in Civil 10,532, there appears to be no dispute as to the Government's right to the relief sought. Accordingly, in all of the aforementioned actions except Civil 10,532 the Government's motions for judgment on the pleadings are granted.

In Civil 10,532 the Government has submitted affidavits explaining the basis for the taking and requested that its motion be treated under Rule 56. The defendant has submitted a reply to the Government's affidavits. This action involves the taking of lands for the relocation of Route 17, a state highway which presently runs through lands taken for the Allegheny Reservoir Project. The defendant questions the Government's right to this land only to the extent that the taking involves more land than would be necessary to duplicate and relocate the existing highway. These additional lands, totaling approximately 50 acres, result from the taking of a wider right-of-way which will permit the future expansion of Route 17 from a 2-lane to a 4-lane limited access highway.

Such an improvement, necessary in light of traffic forecasts, is probable in terms of present state planning. Moreover, the projected highway requirements, it appears, are affected in part by the Allegheny Reservoir Project itself. These factors and also substantial cost savings which would result from a single acquisition and highway design to accommodate the future improvement, apparently have prompted the additional taking.

In the court's opinion the additional lands necessary for the future improvement may not be considered to be independent and divorced from the remainder of the highway relocation project. Language particularly appropriate to this case is found in *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 554 (1945), in which the court stated:

> "Neither the fact that the Authority wanted to prevent a waste of Government funds, nor that it intended to cooperate with the National Park Service detracted from its power to condemn granted by the Act. The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost. [Case cited.] And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public."

That similar and equally compelling considerations have prompted the taking of additional lands in this case, is clear.

The role of the court in this case is limited to determining that the taking is for a public purpose and that the Secretary of the Army has not exceeded his delegated authority. See: *Berman* v. *Parker*, 348 U.S. 26, 32-33 (1954); *United States ex rel. TVA* v. *Welch*, *supra*.

That Congress has authorized the taking of Indian lands for the Allegheny Reservoir Project is not questioned. See: *Seneca Nation of Indians* v. *Brucker*, 262 F. 2d 27 (D.C. Cir. 1958). In addition, in enacting section 701 c-1 of Title 33 U.S.C. which delegates certain powers to the Secretary of the Army with respect to dam and reservoir, channel improvement, or channel rectification projects, Congress authorized and directed the Secretary of the Army "to acquire . . . title to all lands, easements, and rights-of-way" necessary for such projects. As defined by

that section, "lands, easements and rights-of-way" include acquisitions for "highway . . . relocation."

It follows, therefore, that the lands taken for the relocation of Route 17 are sought for a purpose considered by Congress to be a public purpose. That relocation of roads inundated or otherwise lost due to federal flood control projects is a public purpose would appear obvious. Equally apparent is the fact that the authority to carry out that public purpose has been specifically delegated to the Secretary of the Army. The judgment of the Secretary, who determines in the exercise of his delegated authority the necessity and expediency of the taking, is not subject to judicial review. See: *Boom Co.* v. *Patterson*, 98 U.S. 403, 406 (1878); *United States* v. *Gettysburg Electric Ry.*, 160 U.S. 668, 685 (1896); *Adirondack Ry.* v. *New York State*, 176 U.S. 335, 349 (1900); *Bragg* v. *Weaver*, 251 U.S. 57, 58 (1919); *Joslin Co.* v. *Providence*, 262 U.S. 668, 678 (1922); *Rindge Co.* v. *Los Angeles*, 262 U.S. 700, 709 (1922); *Berman* v. *Parker*, 348 U.S. 26, 35-36 (1954); *United States* v. *Mischke*, 285 F. 2d 628 (8th Cir. 1961).

The Government's motions for delivery of possession and summary judgment are granted.

Submit orders.

JOHN O. HENDERSON
John O. Henderson
United States District Judge

Dated: Dec. 31st, 1963.

APPENDIX "C"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil No. 10,532

Order of Summary Judgment

Tracts 3016-E-4 and 3060-E-3

UNITED STATES OF AMERICA, *Plaintiff*,

v.

150.83 ACRES OF LAND, MORE OR LESS, SITUATE IN CATTARAUGUS COUNTY, STATE OF NEW YORK, AND THE SENECA NATION OF INDIANS, A BODY CORPORATE, ET AL.,
Defendants.

Upon the decision and order of this Court previously filed on the 31st day of December, 1963, it is

ORDERED, ADJUDGED and DECREED that the United States of America is entitled to take by condemnation the road easements as described in Schedule B of the complaint, concerning Tracts 3016-E-4 and 3060-E-3, and it is further

ORDERED, ADJUDGED and DECREED that the defenses asserted by the defendant, Seneca Nation of Indians, in its answer, do not constitute a legally sufficient defense to the taking of the road easements, as described in Schedule B of the complaint, concerning Tracts 3016-E-4 and 3060-E-3, and it is further

ORDERED, ADJUDGED and DECREED that the defenses asserted by the defendant, Seneca Nation of Indians, in its answer, are legally insufficient concerning the nature, character and extent of the taking of the road easements by the United States, as described in Schedule B of the complaint in Tracts 3016-E-4 and 3060-E-3, and it is further

ORDERED, ADJUDGED and DECREED that the United States of America is hereby declared to be vested with perman-

ent and assignable easements on Tracts 3016-E-4 and 3060-E-3, for the purpose of constructing, reconstructing and maintaining thereon a highway and appurtenances, together with the right to control access on such highway to and from which the owners or occupants of abutting property, or any other persons, shall have no right of access either as pedestrians, as operators of vehicles, or in any other capacity, except at junctions of such highway with other public highways; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

This order, holding that the United States of America is authorized to condemn an easement for a limited-access highway over lands claimed by defendant, the Seneca Nation of Indians, under the Treaty of November 11, 1794 (7 Stat. 44), involves a controlling question of law as to which there is substantial ground for differences of opinion, and an immediate appeal from the order may materially advance the ultimate termination of this case and other related litigation pending before this Court.

Dated: Buffalo, New York, January 17, 1964.

/s/ JOHN O. HENDERSON
United States District Judge